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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 849 29

ELMIRA NICHOLS AND PAULINE THOMPSON,
Appellants,

vs.

COMMONWEALTH OF MASSACHUSETTS.

APPEAL FROM THE SUPERIOR COURT, COUNTY OF WORCESTER, COMMONWEALTH OF MASSACHUSETTS.

STATEMENT AS TO JURISDICTION.

OSMOND K. FRAENKEL,
SIDNEY S. GRANT,
SAMUEL E. ANGOFF,
Counsel for Appellants.

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APPEAL FROM THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS FOR THE COUNTY OF WORCESTER.

APPELLANTS' STATEMENT DISCLOSING BASIS OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

This Court has jurisdiction of this appeal because it is a case wherein was drawn in question the validity of a municipal ordinance of the city of Worcester in the Commonwealth of Massachusetts and the operation thereof as being repugnant to a provision of the Constitution of the United States and the decision of the highest court

in the Commonwealth of Massachusetts, in which a decision could be had, was in favor of the validity of said municipal ordinance and its operation.

The Act of Congress of February 13, 1925, Chapter 229, 43 Stat. 937, gives jurisdiction to this Court on writ of error to "a final judgment or decree in any suit in the highest court of the state in which a decision could be had where is drawn in question * * * the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States and the decision is in favor of its validity".

For the purposes of review by the United States Supreme Court a State statute includes municipal ordinances as well as legislative enactments.

King Mfg. Co. v. *Augusta*, 277 U. S. 100;

New Orleans Publishing Service v. *New Orleans*, 281 U. S. 682.

Under the Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, an appeal may be taken in any case which under prior statute could be reviewed as a matter of right on writ of error.

The decision of the Supreme Judicial Court of Massachusetts sustaining the validity of the ordinance and its operation was rendered on the twenty-first day of December, 1938, the same appearing on page 1969 *et seq.* of the Advance Sheets of the Massachusetts Reporter for the year 1938, and which will also be found in 18 N. E. (2d) 166. Said decision was rendered by the highest court of the Commonwealth of Massachusetts and is a final decision upon all the constitutional issues involved in the case and reaffirms and makes final the judgment of the Superior Court. The said decision is herewith annexed and marked as Appendix "A".

This case is a criminal prosecution begun as a complaint against the appellants for distributing leaflets in alleged violation of an anti-littering ordinance of the city of Worcester. The history of the case is as follows: The appellants were distributing leaflets in a public square of Worcester; this they were doing in an orderly and peaceful manner. They themselves were not scattering any of the leaflets but some of the persons to whom they were handed did throw them on the streets.

The appellants were then arrested by an officer of the city of Worcester and charged with violation of that portion of Section 12, Chapter 36 of the Revised Ordinances of the City of Worcester which reads that "No person shall distribute in or place upon any street or way, any placard, handbill, flyer, poster, advertisement or paper of any description. No person shall transport through the streets of the city any rubbish without first covering or fastening said rubbish so as to prevent the same from being blown or scattered about in the streets" (R. 1).

In the Central District Court of Worcester both appellants move to dismiss on the grounds that the ordinance was contrary to the Constitution of the United States, Fourteenth Amendment and void on its face. The motion was denied and the appellants were fined five dollars ($5.00) (R. 2).

They then appealed to the Worcester Superior Court where a trial *de novo* was had without jury. At the beginning of the case, before evidence was introduced, the appellants duly moved to quash and dismiss on the following grounds (R. 4, 7):

First. That the complaint neither in form nor in substance charges any crime to have been committed by the said appellants;

Second. That the ordinance of the city of Worcester being void and unconstitutional on its face is, therefore, unenforceable against the appellants (citing *Lovell* v. *The City of Griffin*, 303 U. S. 444); and,

Third. That the freedom of the press guaranteed by the Fourteenth Amendment of the United States Constitution extends to every sort of publication which affords a vehicle of information and opinion and that to prohibit the distribution of literature strikes at the very foundation of the freedom of the press and that the said ordinance of the city of Worcester under which the appellants are being prosecuted contravenes these basic mandates in that the said ordinance abridges the freedom of the press and is, therefore, unconstitutional and invalid.

The trial judge denied the motion to quash and dismiss and found the appellants guilty (R. 5, 8). The appellants duly filed exceptions and the case was heard by the Supreme Judicial Court of Massachusetts which later rendered an opinion upholding the validity of the ordinance, denying the appellants' motion to quash and dismiss and reaffirming their conviction. In the said court's opinion the ordinance did not violate the freedom of the press guaranteed by Section 1 of the Fourteenth Amendment of the United States Constitution and did not fall within the principles enunciated in *Lovell* v. *The City of Griffin*, 303 U. S. 444. The State court also ruled that the ordinance did not apply to the sale of printed matter or to its casual passing by one traveller to another but only to its free distribution on the streets of the city of Worcester and was constitutional, therefore, and not a violation of the freedom of press as aforesaid or in conflict with the decision of *Lovell* v. *The City of Griffin*, *supra*. (See Appen. "A", *post*).

The ordinance in question, Section 12, Chapter 36 of the Revised Ordinances of the City of Worcester, has been here-

tofore set out in the facts. Reference to pages 4, 5, 7 and 8 of the record shows that the validity of the foregoing ordinance was drawn in question as being repugnant to Section 1 of the Fourteenth Amendment of the Federal Constitution which states that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws".

That this provision of the Constitution applied to "freedom of the press" is fully and aptly demonstrated by the case of *Lovell* v. *The City of Griffin, supra,* the most recent case on this subject.

Appellants cite the following decisions of the Supreme Court of the United States as indicating that this tribunal has jurisdiction to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts upon the validity of a municipal ordinance and its operation in this case, which validity was drawn in question in the original prosecution and passed upon by the highest court of the State.

Lovell v. *City of Griffin,* 303 U. S. 444;
Yick Wo v. *Hopkins,* 118 U. S. 356;
Asakura v. *Seattle,* 265 U. S. 332;
Barbier v. *Connelly,* 113 U. S. 27;
Gundling v. *Chicago,* 177 U. S. 183;
Schmidinger v. *Chicago,* 226 U. S. 578.

The constitutional questions raised are serious and not frivolous.

Zucht v. *King,* 260 U. S. 174, 176;
Lovell v. *City of Griffin, supra.*

The purpose of the appellants is to show that an ordinance such as the one in question which purports to regulate the littering of streets is in reality and effect one that creates an unreasonable if not a total restriction on the free dissemination of literature and opinion and is thus in violation of the right of freedom of the press.

In California and Wisconsin recent decisions have been rendered adverse to the contention of the appellants which have held that city ordinances similar to the one in question were constitutional.

Young v. *People of California*, 85 P. (2d.) 231;
City of Milwaukee v. *Snyder* (a Wisconsin case argued at the August term of the State Supreme Court; the citation of which is not available at this writing).

The appellants are informed that the above cases are also in the process of being appealed to this tribunal.

However, other jurisdictions have held that this same type of anti-littering ordinance is unconstitutional.

People v. *Armstrong*, 73 Mich. 288;
People v. *Johnson*, 191 N. Y. S. 750.

More recently the doctrine that such ordinances are unconstitutional is reaffirmed in the cases of *People ex Rel. Gordon* v. *McDermott*, 169 N. Y. Misc. 743, and *C. I. O.* v. *Hague*, 25 Fed. Supp. 127, affirmed by the Third Circuit Court of Appeals January 26, 1939, the appeal of which is now pending before this Court.

That the questions raised are substantial and merit consideration can be seen from the protracted discussion by the State court and its consideration of the opinion in the *Lovell* v. *The City of Griffin* (*supra*) case; the close comparison of the facts in this case with those in *Lovell* v. *The City of Griffin* and other like cases; the effect of the ordinance, rather than its stated purpose, as violating freedom

of the press; and whether or not the doctrine of the case of *Lovell* v. *The City of Griffin* may be held to be inapplicable by a State court which construed the ordinance in question as prohibiting free distribution of literature, but not sale thereof, on the streets of the city instead of within the city limits.

Thus it may be clearly seen that the validity of the municipal ordinance was drawn in question as being repugnant to the freedom of the press guaranteed under said section and article of the United States Constitution and that the decision of the Supreme Judicial Court, which was the highest court in the Commonwealth of Massachusetts in which a decision could be had, was in favor of the validity of said ordinance and considered and passed upon the Federal question raised in the trial court.

The Court has before it an ordinance which is similar to many others, all of which purport to prevent the littering of streets but which actually result in a prohibition of the dissemination of literature. If this type of ordinance is held to be valid it will seriously curtail the right of individuals and trade union, religious, political or other associations to circulate information and opinion among the public. All individuals or organizations who are unable to resort to either the newspaper or to the radio as a medium for reaching the public, whether because of lack of wealth or affluence, or because of their current unpopularity, are forced to distribute printed matter on the streets as, perhaps, their only other effective means of disseminating their opinion. To deny them the right to distribute literature on the public streets would, in effect, deny them the opportunity of circulating their thought and opinion in printed form to the public.

If the purpose of the ordinance is to prevent littering, this can hardly be accomplished under the construction placed upon it by the State court. The unrestricted sale of printed

matter on public streets would have the same tendency to cause litter thereon as would free dissemination of the same literature. The net result is that the ordinance, as construed by the State court, on the one hand permits littering in some instances, thus defeating its avowed purpose, and on the other hand totally forbids the distribution of free literature thus denying the right of freedom of the press.

Only while free speech and free press are guarded from the restrictions and burdens which have destroyed these rights in many countries in Europe can democracy continue to flourish. So-called anti-littering ordinances which operate to prevent the dissemination of printed matter to the public should not be countenanced because they are clothed with the purpose of keeping litter from accumulating on the streets. Freedom of press in this country is far more important than the comparatively insignificant annoyance of an occasional untidy street.

Respectfully submitted,

OSMOND K. FRAENKEL,
SIDNEY S. GRANT,
SAMUEL E. ANGOFF,
Attorney for Appellants.

APPENDIX "A".

QUA, *Justice:*

Each defendant has been convicted and fined $5 for violation of c. 36, s. 12, of the Revised Ordinances of the city of Worcester, which reads as follows: "No person shall distribute in or place upon any street or way, any placard, handbill, flyer, poster, advertisement or paper of any description. No person shall transport through the streets of the City any rubbish without first covering or fastening such rubbish so as to prevent the same from being blown or scattered about in the streets."

At the beginning of the trial, before any evidence was introduced, each defendant moved "to quash and dismiss" the complaint against her on the ground that it did not charge the commission of any crime and that the ordinance was unconstitutional and void. In each case the only exception is to the denial of the motion. In each case the only point raised and argued is that the ordinance is void on its face in that it interferes with the freedom of the press as guaranteed by section 1 of the Fourteenth Amendment to the Constitution of the United States, U. S. C. A. Const. Amend. 14, s. 1, and by art. 16 of the Declaration of Rights of the Constitution of this Commonwealth. We confine our discussion to this point, and we assume in accordance with the trend of recent decisions that freedom of the press is a "liberty" protected by the due process clause of the Fourteenth Amendment against interference by State law; that, for present purposes, a duly authorized city ordinance is a State law; and that liberty of the press extends to the kinds of printed matter to which the ordinance refers and includes distribution as well as publication. Lovell *v.* Griffin, 303 U. S. 444, 450, 452, 58 S. Ct. 666, 82 L. Ed. 949, and cases cited.

In the recent case of Commonwealth *v.* Kimball, Mass. 13 N. E. 2d 18, 114 A. L. R. 1440, we had occasion to consider the validity of an ordinance of Fall River the main portion of which, exclusive of a proviso at the end, was substantially the same as the ordinance here involved. We there held that the ordinance, considered apart from the proviso,

was valid. On page 21 we said, "The distribution of handbills or similar papers in streets tends to annoy travelers and abutters, to obstruct the streets, and to litter them with paper. It seems to us a valid exercise of the power to maintain the 'internal police' of a city, to prohibit such distribution entirely." Many cases were cited in support of that statement. Although there are cases to the contrary, we felt and we still feel that the cases cited represent the sounder view. Reference to the original papers in the Kimball Case shows that the same contention was argued there that is urged here. That case is a precedent upon the issue here presented. Ordinarily we would regard such a precedent as decisive and would forbear further discussion. But it is pressed upon us that the case of Lovell *v.* Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949, decided a few weeks after the Kimball Case was decided, is inconsistent with that case, and it therefore becomes our duty to consider whether we are now required to modify our views.

Freedom of the press is a necessity in our political system. It must be sedulously guarded against subtle encroachments under the guise of specious pretexts. But like other constitutional rights it is subject to reasonable rules formulated to serve the public interest and to prevent abuse in the manner of the exercise of the right, so long as the right itself is neither denied nor impaired. This principle is fully recognized in recent decisions of the Supreme Court of the United States. Gitlow *v.* New York, 268 U. S. 652, 666, 667, 45 S. Ct. 625, 69 L. Ed. 1138; Whitney *v.* California, 274 U. S. 357, 371, 47 S. Ct. 641, 71 L. Ed. 1095; Stromberg *v.* California, 283 U. S. 359, 368, 51 S. Ct. 532, 75 L. Ed. 1117, 73 A. L. R. 1484; Near *v.* Minnesota, 283 U. S. 697, 707, 708, 51 S. Ct. 625, 75 L. Ed. 1357; De Jonge *v.* Oregon, 299 U. S. 353, 364, 57 S. Ct. 255, 81 L. Ed. 278. See Commonwealth *v.* Blanding, 3 Pick. 304, 313, 15 Am. Dec. 214; Commonwealth *v.* Libbey, 216 Mass. 356, 103 N. E. 923, 49 L. R. A., N. S., 879, Ann. Cas. 1915B, 659; Commonwealth *v.* Karvonen, 219 Mass. 30, 106 N. E. 556, L. R. A. 1915B, 706, Ann. Cas. 1916D, 846; Commonwealth *v.* Anderson, 272 Mass. 100, 106, 172 N. E. 114, 69 A. L. R. 1097. "Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions

imposed in the interests of the community." Chicago, Burlington & Quincy Railroad Co. *v.* McGuire, 219 U. S. 549, 567, 31 S. Ct. 259, 262, 55 L. Ed. 328. The question before us is whether we can properly say that the ordinance is not a reasonable regulation of the use of the streets affecting only incidentally one method of distributing printed matter, but that it is an actual impairment of the constitutional freedom of the press. We are justified in overriding the judgment of the city's legislative body only if its action is clearly beyond the scope of its power. Commonwealth *v.* Mulhall, 162 Mass. 496, 498, 39 N. E. 183, 44 Am. St. Rep. 387.

The wording of the section of the ordinance as a whole indicates that it was directed to the object of preventing the accumulation of litter and rubbish in the streets and preserving the comfort and preventing the annoyance of travellers, and that it was not directed against the liberty of the press. Properly construed, we see no reason why in practical operation it should extend beyond the legitimate purpose for which it was designed. It does not prevent the casual passing of papers from one traveller to another in isolated instances. See Commonwealth *v.* Ellis, 158 Mass. 555, 33 N. E. 651. It forbids persons to "distribute". This implies an offering to many people, with the consequent probability of littering the neighborhood with papers which, if not painstakingly gathered by someone, will become unsightly, annoying and obnoxious. We think that the word "distribute", in connection with the other language used and in view of the apparent object of the section, does not include sale, and that the ordinance does not forbid the sale of newspapers or other printed matter in the streets. The section is not in any sense directed toward the suppression of ideas, theories or opinions. It involves no censorship. It interferes in no way with the publication of anything in the city of Worcester, except only that it excludes the public streets and ways from the places available for free distribution. It leaves open for such distribution all other places in the city, public and private.

In Commonwealth *v.* Morrison, 197 Mass. 199, at page 204, 83 N. E. 415, at page 417, 14 L. R. A., N. S., 194, 125 Am. St. Rep. 338, this court said, "The primary purpose of a

highway is the passing and repassing of the public, which is entitled so far as needed to the full, unobstructed and uninterrupted enjoyment of the entire width of the layout for that purpose." In re Opinion of the Justices, Mass., 8 N. E. 2d 179. The constitutional right of free speech cannot be so exercised as to obstruct the public in the enjoyment of its easement of travel. Commonwealth *v.* Surridge, 265 Mass. 425, 164 N. E. 480, 62 A. L. R. 402. See Commonwealth *v.* Davis, 140 Mass. 485, 4 N. E. 577; Commonwealth *v.* Abrahams, 156 Mass. 57, 30 N. E. 79; Commonwealth *v.* Davis, 162 Mass. 510, 39 N. E. 113, 26 L. R. A. 712, 44 Am. St. Rep. 389, affirmed Davis *v.* Massachusetts, 167 U. S. 43, 17 S. Ct. 731, 42 L. Ed. 71. The constitutional right to freedom of religious worship does not prevent the enforcement of reasonable rules and regulations for the use of streets and public places. Commonwealth *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 2 L. R. A., 142, 12 Am. St. Rep. 566. The preservation of the public right of travel in the streets against annoyance of any kind has always been a proper subject of legislative action. Commonwealth *v.* Fox, 218 Mass. 498, 106 N. E. 137, Ann. Cas. 1916A, 1236; In re Opinion of the Justices, 251 Mass. 569, 595, 147 N. E. 681; Commonwealth *v.* Boston & Maine Transportation Co. 282 Mass. 345, 348, 185 N. E. 40; General Outdoor Advertising Co., Inc. *v.* Department of Public Works, 289 Mass. 149, 181, 193 N. E. 799.

In our opinion this case is to be distinguished from Lovell *v.* Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949, upon which the defendants principally rely. The ordinance which was there struck down was not a regulation of the use of the streets. It was an absolute prohibition of the distribution of "literature of any kind" anywhere within the city, whether delivered free or sold, without the written permission of the city manager. The city manager was thus made the sole arbiter, apparently without appeal, as to what literature of any kind should be allowed within the city. Plainly such an ordinance goes far beyond reasonable regulation and infringes upon fundamental rights. The court said of that ordinance, "It covers every sort of circulation 'either by hand or otherwise.' There is thus no restriction in its application with respect to time or place. It is not

limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets." 303 U. S. at page 451, 58 S. Ct. at page 669.

We hold that the section of the ordinances of Worcester here involved is not a denial or impairment of the freedom of the press, but that it is a reasonable and valid regulation of the use of the public ways for the preservation of public order, the protection of travellers from annoyance, and the prevention of misuse of littering of the streets, and that it affects the right of publication only collaterally and incidentally by curbing what the city may regard as abuses detrimental to the public in the manner of the exercise of that right. Commonwealth *v.* McCafferty, 145 Mass. 384, 14 N. E. 451; Commonwealth *v.* Haffer, 279 Mass. 73, 180 N. E. 615; Commonwealth *v.* Kimball, Mass., 13 N. E. 2d 18, 114 A. L. R. 1440. Our opinion is fully supported by well reasoned decisions of the courts of last resort of Nebraska and of Wisconsin in closely parallel cases. In re Anderson, 69 Neb. 686, 96 N. W. 149, 5 Ann. Cas. 421; City of Milwaukee *v.* Kassen, 203 Wis. 383, 234 N. W. 352. Whether the legitimate objects of the section could be substantially accomplished by less sweeping provisions is a matter for the consideration of the city's legislative body and not for us.

It follows that the complaints duly charged a criminal offense, and that there was no error in denying the motions to quash and dismiss them.

In each case the entry will be

Exceptions overruled.

Filed March 2nd, 1939.
Attest: Philip S. Smith, Assistant Clerk.